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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 250

ARTHUR BINGAMAN, ADMINISTRATOR OF THE ESTATE OF ALVIN A. BINGAMAN, DECEASED,

Appellant,

vs.

ERIC H. REHN AND JOHN P. MAINELLI, DOING BUSINESS UNDER THE NAME AND STYLE OF JOHN P. MAINELLI CONSTRUCTION COMPANY

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEBRASKA

STATEMENT OF APPELLEE ERIC H. REHN OPPOSING JURISDICTION AND MOTION TO DISMISS

EDWARD K. MCDERMOTT,
EMMET L. MURPHY,
Counsel for Appellee, Eric H. Rehn.

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IN THE SUPREME COURT OF THE UNITED STATES
ON APPEAL FROM THE SUPREME COURT
OF NEBRASKA

No. 250

ARTHUR BINGAMAN, Administrator of the Estate of Alvin A. Bingaman, Deceased,

Appellant,

vs.

ERIC H. REHN and JOHN P. MAINELLI, doing business under the name and style of John P. Mainelli Construction Company

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OBJECTIONS OF APPELLEE, ERIC H. REHN, TO THE JURISDICTION OF THE COURT; AND MOTION TO DISMISS APPEAL.

This is a simple action in tort, originally instituted in the District Court of Douglas County, Nebraska, and brought by Appellee, Eric H. Rehn, against Appellant, Arthur Bingaman, as Administrator of the Estate of Alvin A. Bingaman, Deceased, for the purpose of recovering damages for injuries sustained by Appellee growing out of the alleged negligence of the said Appellant. The alleged tort feasor, Alvin A. Bingaman, died almost instantly following the doing of the alleged negligent act which produced the injuries sustained by Appellee Rehn. The action, therefore, was subsequently brought against the Administrator of the Estate of said deceased, Alvin A. Bingaman. Ap-

pellee John P. Mainelli, doing business under the name and style of John P. Mainelli Construction Company, was made a party defendant solely because of the provisions of Section 48-118 Revised Statutes of Nebraska 1943, referred to in Appellant's proposed appeal and only in order that, pursuant to provisions of said section and if and when Appellee Rehn should ultimately prevail, the proceeds of his recovery would be so distributed as to provide reimbursement to his employer, the said John P. Mainelli, for any benefits paid under the provisions of the Nebraska Workmen's Compensation Act.

Appellee Rehn prevailed in the trial court and the present Appellant thereupon appealed to the Supreme Court of Nebraska. The Supreme Court of Nebraska on April 14, 1949, filed its opinion under and by virtue of which the judgment in the District Court of Douglas County, Nebraska, was "reversed and dismissed". (See opinion set out in Appellant's proposed appeal.)

All questions raised and presented by Appellant in this proposed appeal, under the present state of the record, have therefore at this time become moot.

Assuming, however, that Appellee Rehn may relitigate the matter, commencing this time by way of claim in the County Court of Douglas County, Nebraska, that is the probate court, and anticipating, therefore, the possibility that at some future date the same questions may again arise, and that, therefore, we may at this time indulge in an academic discussion of the proposition, we respectfully submit the further matters for consideration by the court.

Even the matter of the jurisdiction of the trial court was not raised by Appellant until after trial and verdict of the jury. In other words, Appellant took his chances on a successful outcome of the trial and having failed in that,

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and only thereafter, did he inject into the case the matters now being presented. (See original transcript and Bill of Exceptions.)

As the basis for his appeal Appellant contends that Section 49-101 Revised Statutes of Nebraska 1943 and Section 48-118 Revised Statutes of Nebraska 1943 and Section 13, Article 1 Constitution of the State of Nebraska are each or all in conflict with the provisions of Section 1, Amendment XIV of the Constitution of the United States. (Appellant's Assignment of Errors herein.)

It is most difficult to see how the provisions of this Amendment to the Constitution of the United States can be drawn into consideration on any matter involved in the present action. Surely such procedure would have been most surprising to the people who drew and adopted said Article XIV.

It is conceded that if the alleged tort feasor, Alvin A. Bingaman, had not died that Appellee Rehn would have had a constitutional right to maintain this action against him. But Appellant contends that this right of action would not survive such death and that the Appellee, therefore, has no constitutional right to maintain this action to recover for the identical injuries. It would, therefore, seem to us that Appellant's contention itself is directly contrary to the "equal protection of the law" provision of said Article XIV, if that constitutional provision is involved at all in this controversy.

Referring then specifically to the above three items and taking them in reverse order, it will be observed that Section 13, Article 1 of the Constitution of the State of Nebraska reads as follows:

"All courts shall be open, and every person, for any injury done him in his lands, goods, person or reputation

shall have a remedy by due course of law, and justice administered without denial or delay."

Surely this is but a restatement in broader and more general terms of the provisions of said Article XIV, Section 1 of the Constitution of the United States.

A mere reading of the second item, that is, Section 48-118 Revised Statutes of Nebraska 1943, set out in Appellant's proposed appeal, discloses immediately that this section has nothing to do with basic rights; that it attaches and applies only after the rights of recovery have been determined and then merely directs the manner of the application of the proceeds so as to protect the subrogation rights of the employer. This section is a part of the Workmen's Compensation Law of Nebraska. It creates no right of action. It applies only, as stated in the first phrase of the section, "where a third person is liable to the employee or to the dependents". It has uniformly been so held and applied by the Nebraska courts and was so held and applied by the Supreme Court of Nebraska in the present case.

Referring finally to the third point, being the first of Appellant's proposed Assignment of Errors, it will be observed that this Section 49-101 Revised Statutes of Nebraska 1943 reads as follows:

"So much of the common law of England as is applicable and not inconsistent with the Constitution of the United States, *with the organic law of this state*, or with any law passed or to be passed by the Legislature of this state, is adopted and declared to be law within the State of Nebraska." (Emphasis added.)

What is the organic law of the State of Nebraska and how and where is that organic law determined?

We respectfully submit that the Supreme Court of Nebraska is the court and the only court to make such deter-

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mination, and that such determination when made by the Supreme Court of Nebraska is binding upon the Federal courts.

We believe that under the Rules a long dissertation or citation of authority would be out of place in this pleading. We, therefore, respectfully direct the attention of the Court to the following brief excerpt and cases therein cited from *Mattson* v. *Central Electric & Gas Co., et al.*, 174 F. 2d 215 (Eighth Circuit, decided April 11, 1949):

"The governing substantive law is that of the State of Nebraska. Erie Railroad Co. *v.* Tompkins, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, 114 A. L. R. 1487. We do not believe that the Supreme Court of Nebraska has squarely passed upon the law issue presented by this case in any gas case. The court has, however, had before it somewhat analogous situations and made some pronouncements which may not have been essential to the determination of the issues, but 'Considered dictum of that court should not be ignored when a federal court is attempting to construe or ascertain the meaning of the local law, whether it be the state statute or the State Constitution.' Badger *v.* Hoidale, 8 Cir., 88 F. 2d 208, 211, 109 A. L. R. 798. See, also: Yoder *v.* Nu-Enamel Corp., 8 Cir., 117 F. 2d 488; Hawks *v.* Hamill, 288 U. S. 52, 53 S. Ct. 240, 77 L. Ed. 610."

As pointed out by the Supreme Court of Nebraska, this has been determined by that Court in the *Grainger* case and the *Wilfong* case as well as the opinion of that court in the present case. (See opinion set out in Appellant's proposed appeal.) In its opinion in the present case the Supreme Court of Nebraska said:

"Admittedly, there are authorities from other jurisdictions which have reached contrary conclusions, but it appears that they have done so either under statutes or constitutional provisions different from our own, or regardless, have applied strictly the common-law rule of 'actio personalis moritur cum persona' to the full extent of its original

scope, which *in the light of its conflict with our organic law and statutes,* as well as our modern needs and conditions, this court has refused to do." (Emphasis added.)

WHEREFORE, Appellee Eric H. Rehn respectfully moves the Court to dismiss the proposed appeal herein.

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